U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN E. MORALES and U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY

Docket No. 02-2305; Submitted on the Record;
Issued June 4, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's right to compensation effective January 27, 2002 for refusing to submit to or obstructing a medical examination.

This is the second appeal in this case. The Board issued a decision[1] on September 25, 2001 in which it reversed the January 25, 1999 decision of the Office on the grounds that the Office did not meet its burden of proof to terminate appellant's compensation effective January 25, 1999.[2] The Board found that there was a continuing conflict in the medical evidence between the referral physician and appellant's physician regarding whether appellant continued to have residuals of her employment injury after January 25, 1999.[3] The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In late December 2001, the Office referred appellant to Dr. James McIntosh, a Board-certified orthopedic surgeon, for an independent medical examination and an opinion regarding whether she continued to have residuals of her employment injury. By letter December 21,

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[1] Docket No. 00-1136 (issued September 25, 2001).

[2] In June 1993, the Office accepted that appellant, then a 35-year-old distribution clerk, sustained bilateral carpal tunnel syndrome due to working on a letter sorting machine. Appellant underwent carpal tunnel release surgeries of both wrists in 1990 and 1991, which were authorized by the Office. In September 1996, appellant filed a claim alleging that she sustained an employment-related back injury on September 11, 1995. This claim is set forth in the Office file numbered A2-719039 and is not the subject of the present appeal.

[3] In a report dated March 7, 1998, Dr. Andrew J. Dowd, a Board-certified hand surgeon who served as an Office referral physician, indicated that appellant had essentially normal upper extremity findings and determined that she could work full duty as a letter sorting machine distribution operator without restrictions. In contrast, Dr. Joseph L. Paul, an attending Board-certified orthopedic surgeon, noted in June 4 and December 1, 1998 reports that appellant continued to have disabling residuals of her employment-related condition.

2001, the Office advised appellant that she had an appointment for a medical examination with Dr. McIntosh at 3:30 p.m. on December 27, 2001. The Office informed appellant that her failure to appear for the examination or her failure to provide a valid reason for not appearing for the examination would result in the suspension of her compensation.[4]

Appellant did not appear for the examination at the scheduled time. By letter dated January 17, 2002, the Office advised appellant that she had failed to appear for the examination scheduled for December 27, 2001.[5] The Office again informed appellant of the consequences of refusing to submit to or obstructing a medical examination and provided her with 14 days for a valid reason for failing to keep the appointment.[6] The record contains a notation, made on January 15, 2002, in which an Office claims examiner discussed the scheduled appointment and noted that appellant left a telephone message indicating that "she was in [New York] at the time."

By decision dated January 31, 2002, the Office suspended appellant's right to compensation effective January 27, 2002 for refusing to submit to or obstructing a medical examination. The Office indicated that appellant failed to attend an examination scheduled with Dr. McIntosh for December 27, 2001 and stated:

> "Your compensation was terminated on January 25, 1999 because the evidence in the case file did not support that you were suffering any residuals from your carpal tunnel syndrome which rendered you incapable of any work…. When your case was remanded to this office by the [Board], their instructions were to arrange for a referee medical examination to determine if indeed there was any disability subsequent to January 25, 1999. As you chose not to go for the examination, I must use the evidence in [the] file which indicates no disability, and I must also apply the penalty provision embodied in section 8123 of the [Federal Employees' Compensation] Act. The net result is that you have not proven that you suffered any residuals from your work-related injury subsequent to January 25, 1999 and therefore you have no entitlement to any [Federal Employees' Compensation Act] benefits subsequent to January 25, 1999."

The Board finds that the Office properly suspended appellant's right to compensation effective January 27, 2002 for failing to submit to or obstructing a medical examination.

Section 8123(a) of the Act[7] authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems

[4] The letter was sent *via* federal express to appellant's home address: 4786 Silver Road, Manning, SC 29102.

[5] The Office indicated that appellant had advised the Office *via* telephone that the address in South Carolina was her permanent address.

[6] It does not appear that appellant responded in writing to the Office's January 17, 2002 letter. On January 7, 2002 the Office received a letter dated December 31, 2001 in which appellant indicated that she had chosen to continue receiving benefits from the Office of Personnel Management and claimed that the Office owed her compensation for the period January 26 to June 8, 1999.

[7] 5 U.S.C. § 8123(a).

necessary. The determination of the need for an examination, the type of examination, the choice of local and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[8] Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, [her] right to compensation is suspended until refusal or obstruction stops."[9] If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.[10]

The Board has reviewed the evidence of record and notes that the Office properly determined that appellant refused to submit to or obstructed a medical examination within the meaning of section 8123 of the Act. The Office advised appellant that she had an appointment for a medical examination with Dr. McIntosh, a Board-certified orthopedic surgeon, at 3:30 p.m. on December 27, 2001.[11] Appellant did not appear for the examination at the scheduled time and the Office gave her an opportunity to provide a valid reason for not appearing for the examination.[12] It does not appear that appellant responded in writing to the Office's January 17, 2002 letter requesting an explanation of her failure to appear. The record contains a notation in which an Office claims examiner noted that appellant left a telephone message indicating that "she was in [New York] at the time." However, this notation must be considered vague and incomplete in nature and appellant failed to provide a valid reason for failing to attend the examination scheduled for December 27, 2001. Therefore, the Office properly suspended her compensation effective January 27, 2002.

The Board further finds that the Office, in its January 31, 2002 decision, improperly characterized appellant's entitlement to compensation after January 25, 1999. The Office incorrectly indicated that the Board, in its September 25, 2001 decision, had directed the Office to refer appellant to an impartial medical examiner for consideration of whether she had employment-related disability after January 25, 1999. The Board had reversed the Office's termination of appellant's compensation effective January 25, 1999 and did not direct the Office to further develop the medical evidence.[13] Due to the Board's reversal of the Office's termination action, appellant would be entitled to receive compensation after January 25, 1999. It does not appear from the record that appellant received compensation between January 25,

[8] *See Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

[9] 5 U.S.C. § 8123(d); *see* 20 C.F.R. § 10.323.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

[11] The letter advising appellant of the appointment was sent to her correct permanent address. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

[12] The letter was sent *via* federal express to appellant's home address: 4786 Silver Road, Manning, SC 29102.

[13] The Board determined that there was a continuing conflict in the medical evidence regarding appellant's employment-related disability and that therefore the Office had not met its burden of proof to terminate her compensation effective January 25, 1999.

1999 and the time that her compensation was properly suspended effective January 27, 2002. Therefore, appellant would be entitled to receive compensation between January 25, 1999 and January 27, 2002.

The January 31, 2002 decision of the Office of Workers' Compensation Programs is affirmed as modified to reflect that appellant is entitled to receive compensation between January 25, 1999 and January 27, 2002.

Dated, Washington, DC
June 4, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member